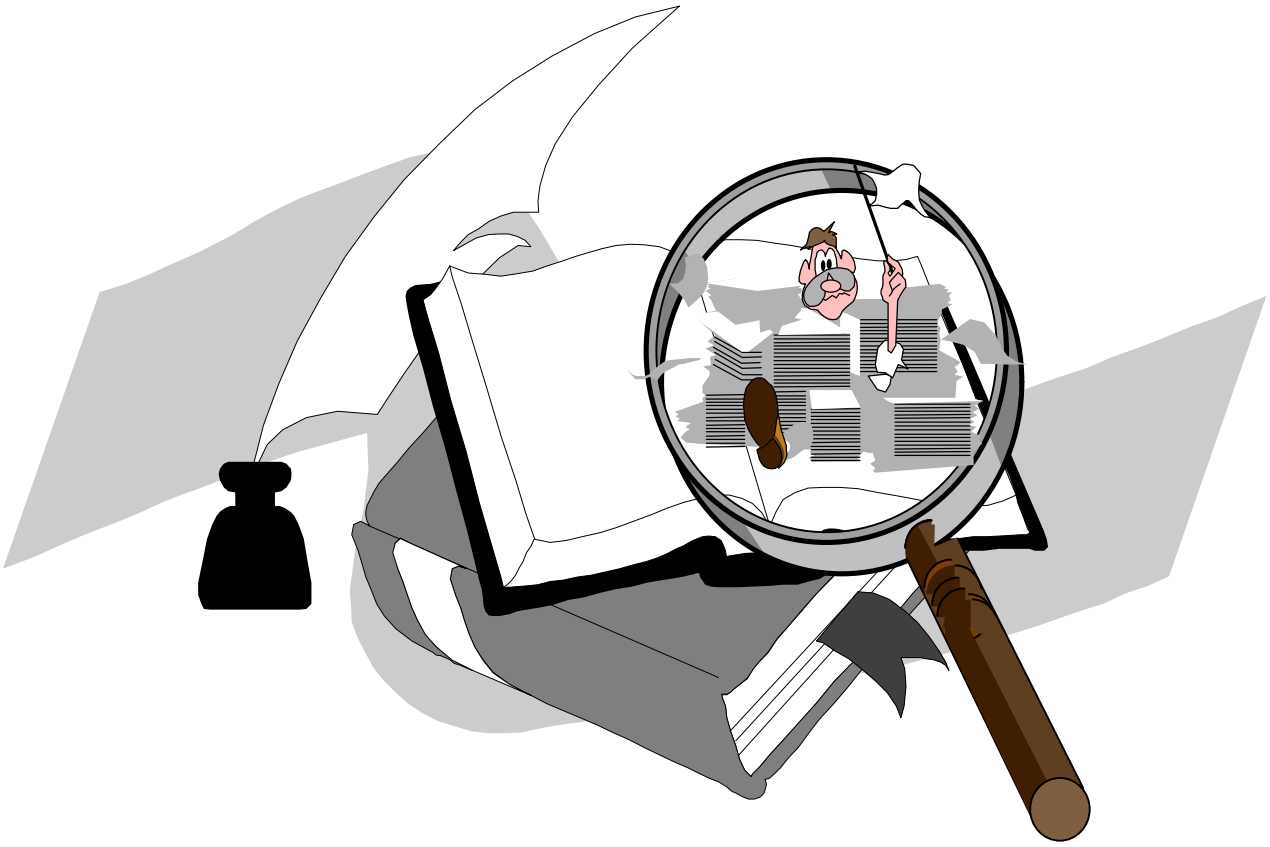
HIGHLIGHTS OF THE FAR PART 15 REWRITE



ACQUISITION REFORM BROADCAST INFORMATION

September 1997

Defense Acquisition Reform Satellite Broadcast Information
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HIGHLIGHTS OF FAR PART 15 (Rewrite) - Contacting By Negotiation

Defense Acquisition Reform Satellite Broadcast - October 15, 1997

What is Best Value?

Best value is the expected outcome of any acquisition that ensures the customer's needs are met in the most effective, economical, and timely manner. It is the result of the combination of: the unique circumstances of each acquisition; the acquisition strategy; choice of contracting method; and the award decision. Best value is the goal of sealed bidding, simplified acquisition, commercial item acquisition, negotiated acquisition, and any other specialized acquisition method or combination of methods. Negotiated acquisition techniques used to obtain best value may span a "continuum" from low priced technically acceptable to tradeoffs between price, past performance and the technical solution.

What is the Best Value Continuum?

A recognition that the Government always seeks to obtain the best value in negotiated acquisitions using any one or a combination of source selection approaches, and that the acquisition should be tailored to the requirement. At one end of this continuum is the low priced technically acceptable strategy and at the other end is a process by which elements of a proposed solution can be traded off against each other to determine the solution that provides the Government with the overall best value. Note that all such tradeoffs are conducted according to the source selection factors and subfactors identified in the solicitation.

What happened to Best Value Negotiated Source Selection?

"Best Value" decisions, under the old source selection rules, are now called *"Tradeoff*" decisions. Tradeoffs are used when it is in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.

What general rules about handling solicitations and proposals have changed?

The uniform contract format remained the same, however the mandatory forms SF 1411 and SF 1448 been deleted. Standard forms are mandatory forms designated by regulation and cannot be modified without approval of the issuing agency. The revised FAR now specifies only optional forms (OF 307, 308, 309) that can be tailored. This eliminates the need for an exemption. However, continued use of Standard Forms is permitted.

Is past performance an evaluation element when you choose a Lowest Price Technically Acceptable source selection strategy?

Past performance is, by statute, a mandatory evaluation element of all negotiated source selections. If the source selection team determines it is a discriminator in an LPTA procurement, then the criteria by which past performance will be evaluated on a past/fail basis must be articulated in the solicitation. The team can also determine that past performance is not a discriminator and document the record accordingly. One caution regarding the use of past performance on a pass/fail basis is articulated in the rule. If a small business' past performance is not acceptable, and their technical proposal is otherwise acceptable, the matter shall be referred to the Small Business Administration for a Certificate of Competency determination.

How can you manage the issue of Certificate of Competency determinations and still evaluate technical proposals on a pass/fail basis?

Choose a strategy where technical proposals are evaluated on a pass/fail basis and the final source selection decision is based on a tradeoff between past performance and price. The Air Force version of this strategy is called Performance-Price Trade-Off (PPT). This is a hybrid of LPTA and tradeoff.

What happened to neutral ratings for no past performance information?

The reference to neutral ratings was removed from the final rule in recognition of the dilemma encountered by both industry and Government in defining the term neutral. The language in the final rule is extracted directly from statute stating, *"In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance."* It is incumbent upon each source selection authority (SSA) to construct the past performance source selection criteria for each particular requirement to conform with the statutory direction.

What can the Government talk to industry about during presolicitation dialog?

Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. The purpose of these exchanges are to improve understanding of Government's requirements and industry capabilities. Information exchanged may include the acquisition strategy, contract type, terms and conditions, acquisition planning schedules, feasibility of the requirement and suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information. Techniques may include conferences, public meetings, market research, one-on-one meetings, presolicitation notices, draft Requests for Proposal, Requests for Information, and site visits.

What can the Government talk to offerors about, after receipt of proposals if award without discussion is planned?

All proposals must first be initially reviewed and evaluated. If the Government decides that award without discussions is possible and appropriate, then the Government may decide to give offerors the opportunity to clarify certain aspects of proposals. In addition to what we could previously cover, clarifications *now* include the relevance of an offeror's past performance information and adverse past performance information on which the offeror has not previously had an opportunity to respond. It is important to understand that this requirement does not include the assessments of the Government source selection team of the past performance information available. This addresses the FAR Part 42 requirement that contractor's have an opportunity to comment on past performance evaluations conducted by the Government.

What can the Government talk to offerors about, before determination of the competitive range, when award will be made after discussions?

Once the Government decides that a competitive range will be established, communications shall not provide an opportunity for the offeror to revise its proposal, and

1. *Shall* address adverse past performance information on which an offeror has not had a prior opportunity to comment. It is important to understand that this requirement does not include the Government's "evaluation" of the past performance data received. This requirement only goes to that "data" received by the SSA that was not previously provided to the offeror for review and comment.

2. *May* only be held with offerors whose exclusion from, or inclusion in, the competitive range is uncertain. The objective is to: enhance the Government's understanding of proposals; allow reasonable interpretation of the proposal; or, facilitate the Government's evaluation process for the purpose of establishing the competitive range. This is like fact finding.

How do you determine the competitive range?

The previous rule of *"when in doubt leave them in"* has been replaced with *"when in doubt leave them out."* The competitive range shall now include all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency. Firms do not bear the expense of unnecessary bid and proposal expenses when they are not one of the most highly rated offerors.

How will the new competitive range rules impact small businesses?

We do not anticipate that the number of awards to small businesses will change as a result of this rule. Data gathered across the Government has substantiated the fact that competitive awards are rarely made to offerors that are not initially rated as one of the most highly rated offerors, including small offerors.

Do you determine the competitive range twice if you reduce the range further for efficiency?

No. Two competitive range determinations are not required. Contracting officers should first determine which offerors are the most highly rated and then limit the number of offerors in the competitive range to the largest number that will permit an efficient competition. The rationale used to establish the competitive range should be clearly documented in the competitive range determination. Additional competitive range determinations are possible based on the result of discussions with offerors.

What is the definition of efficiency?

There is no statutory or regulatory definition of efficiency. As circumstances vary this may include, but not be limited to: the nature of the requirement (including production lead time, delivery requirements, etc.); the resources available to conduct the negotiations; the variety and complexity of solutions offered; and any other relevant matters. The judgment of the contracting officer, as to the greatest number that will permit an efficient competition among the most highly rated proposals, is the requirement established by statute.

What are early debriefings supposed to accomplish?

Early, or preaward debriefings introduced by the Clinger-Cohen Act, are conducted at the offeror's request. The purpose of these preaward debriefings is to provide early feedback to industry concerning why the proposal failed to be competitive. This early debriefing, while limited in scope and content, will provide sufficient information to offerors about their proposal evaluation to allow them to benefit from the exchange and to apply that information to other competitions in a timely manner. Offerors will not receive a comparative assessment of the other offerors proposals in an early debriefing.

What can you talk about during discussions?

The primary purpose of discussions is to maximize the Government's ability to get the best value. You must conduct discussions with every offeror in the competitive range. The objective of discussions is to reach a complete agreement between the

Government and the offeror regarding the requirements in the RFP and the offeror's proposed solution. In the commercial world, this is often referred to as a "meeting of the minds," an essential element in the contracting process. This is the opportunity for the Government to engage in "hard bargaining" to ensure that the Government's requirements are met subject to specific limitations (e.g. favoring one offeror over another; revealing an offeror's solution, technology, or intellectual property to another offeror; revealing an offeror's price without that offeror's permission; revealing the names of individuals providing past performance information; or knowingly furnishing source selection information).

While the content of discussions is a matter primarily within the discretion of the contracting officer, discussions must be both meaningful and fair. To be meaningful, the negotiations must identify all deficiencies, all significant weaknesses and concerns about past performance information received by the SSA.

Ensure discussions are meaningful by identifying to the offeror all evaluated deficiencies; significant weaknesses, including weaknesses that when accumulated, increase the risk of unsuccessful contract performance; and other aspects that could be improved to enhance an offeror's award potential .

Deficiencies - A material failure to meet a requirement. It is a deficiency whenever the offeror specifically says a requirement cannot or will not be met, offers an approach that clearly doesn't meet a requirement, or submits a proposal that contains a combination of significant weaknesses.

Significant Weaknesses - Include non-cost and cost weaknesses that appreciably increase the risk of unsuccessful contract performance. It is a weakness whenever the proposal has a flaw important enough to cause a factor to be rated marginal or poor, or the probability of meeting a requirement to be rated high risk or moderate to high risk. This includes even relatively minor weaknesses if their cumulative impact is significant. For example, if an approach affects several areas of the evaluation, but makes no individual factor rating marginal or poor, you should include it in discussions if the cumulative impact is significant enough to affect the overall rating.

Past Performance Information - Include any concern about an offeror's past performance, including relevancy and any adverse past performance information on which the offeror has not previously had an opportunity to comment.

Uncertainties or apparent mistakes - Include any suspected errors, significant omissions, and uncertainties necessary to understand what is being offered.

Confirm all information obtained through discussions by requesting proposal revisions.

Can the competitive range be changed during discussions?

Yes, it may be amended. The contracting officer must first have had an opportunity to discuss with each offeror, significant weaknesses, deficiencies, and other aspects of its proposal. If the contracting officer then decides that an offeror's proposal should no longer be included in the competitive range, the proposal shall be eliminated from consideration for award, and a written notice of the decision provided to the offeror.

What happened to Best and Final Offers?

The revised rule allows the Government and industry to tailor the number of requested or allowed proposal revisions to each offeror's proposal. This change recognizes the fact that proposals are rarely alike, nor are the depth and range of negotiations. After the Government has completed discussions with all offerors and has exercised the opportunity to obtain revisions, as appropriate, all offerors shall be given an opportunity to revise their proposals simultaneously. This final proposal revision opportunity shall use a common cut off date and time to ensure a fair competitive environment, especially for time critical commodities. Most importantly, if after receipt of final revised proposals it becomes necessary to subsequently clarify matters, you can without any additional request for final offers from all offerors. If you need to further expand negotiations, a second final offer opportunity must be extended to all offerors, however, this should be unlikely if the initial revisions are managed well.

What can the SSA rely upon and what must be documented when a source selection decision is made?

The source selection decision shall represent the SSA's independent judgment, although reports and analyses prepared by others may be relied upon. SSA documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. This documentation need not quantify the tradeoffs that led to the decision.

What changed on Oral Presentations?

The rule provides more guidance on the methods the Government should use to articulate expectations regarding the use of oral presentations and the documentation of oral presentations.

What's new with Past Performance?

The rule asserts that the Government will not rely on adverse past performance information that contractor's have not had an opportunity to comment on and

establishes revised thresholds for collection and use of past performance. The rule also expands the coverage regarding what information can be considered for those contractors with no relevant past performance history, to include key personnel who have relevant experience, information regarding predecessor companies, and subcontractors who will perform major or critical aspects of the requirement.

What were the changes to the rules regarding pricing of commercial items?

The revised rule has simplified the Truth in Negotiations Act (TINA) exception when modifying a contract or subcontract for commercial items. Under the new rules, if a modification does not change the item being purchased from a commercial item to a noncommercial item, then the modification is exempt from the requirement to obtain cost or pricing data.

Were changes made to the way contractors submit proposals?

The new rule has eliminated the need for contractors to submit Standard Forms 1411 and 1448. The SF 1411 was used when cost or pricing data was required and the 1448 accompanied proposals that contained information other than cost or pricing data. Both forms have been deleted and the information they contained may now be submitted in plain paper format.

Can I still get field pricing reports?

Both the Defense Contract Management Command (DCMC) and the Defense Contract Audit Agency (DCAA) have significantly changed their business practices over the past several years to reflect the changing acquisition environment. The revised rule recognizes these changes by providing much greater flexibility in the field pricing process and by eliminating the requirement for formal field pricing reports. The arbitrary thresholds for obtaining field pricing reports have been deleted and contracting officers are now encouraged to communicate with DCMC and DCAA early in the process to determine the extent of pricing assistance required. Use of the telephone or other electronic means are now encouraged to request and transmit pricing information.

How about cost realism?

The revised rule adds guidance regarding cost realism analysis. This coverage was added to recognize the requirement to perform cost realism analyses when awarding a cost-type contract as a result of a competitive source selection.

Have the profit rules been changed?

Existing profit policy has not changed. However, the rules regarding fee limitations have been revised to match the law. Previously, statutory limitations on fee paid under cost-plus-fixed-fee contracts were also applied by regulation to cost-plus-incentive-fee and cost-plus-award-fee contracts. Those additional limitations have been removed and now the limits apply only to cost-plus-fixed-fee contracts.

In addition, the new rule removes the requirement for the contracting officer to write a separate determination that the fee limits on cost-plus-fixed-fee contracts have not been exceeded. Now, the contracting officer's signature on the price documentation will serve as that determination.

What changes were made to the rules on unbalanced offers?

The coverage on unbalanced offers has been simplified and the focus has been changed from a step-by-step mathematical approach to an analysis of relative value and risk to the Government. It has also been relocated to reflect the use of this analysis as a proposal evaluation technique in assessing risk and protecting the Government's economic interests.

What remained the same?

The basics of contract pricing have remained the same. Contracting officers are still required to buy at fair and reasonable prices and must document price reasonableness in the price documentation. The hierarchical preference policy regarding the types and amount of pricing information to obtain from contractors also remains unchanged. Except for the change to the rules regarding the modification of commercial contracts, cost or pricing data requirements also remain the same.

What was deleted from the last proposed rule?

The coverage on the new late is not quite late rule was restored to current FAR coverage. The proposed coverage on multiphase procurement was removed, although preaward advisory language remains.